duopoly rule as requested by LSOC, therefore, would do just what the Commission wants to do -- strengthen local broadcasting and improve its service to the public.

1. The economic vitality of broadcast television has declined in the face of growing competition from multichannel media.

The economic decline of broadcast television already is well-documented in the record of this proceeding. Two studies by the Commission staff, for example, found broadcast financial performance suffering the effects of competition from new multichannel media. The now well-known (and oft-cited) "OPP Report" found that many stations on the financial fringe (*e.g*,, small market stations, weak independents in large markets, and UHF independents in general) will find it increasingly difficult to compete as the year 2000 approaches.[126] The OPP Report further predicted that broadcast stations generally would suffer declining revenue, that the viability of small market stations would be imperiled, and that even in large markets stations would cut back local news and public affairs programming.[127]

More recently, in its *Overview of the Television Industry*, the Policy and Rules Division of the Commission's Mass Media Bureau found that television station revenues have failed to keep up with inflation, that revenues per station generally did not keep up with inflation, and that average station profits have fallen

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126OPP Report, 6 FCC Rcd at 3999.

127OPP Report, 6 FCC Rcd at 4001.

dramatically.[128] It confirmed what is well-known, that broadcast television stations are losing audience to cable television programming services.[129]

Comments of individual broadcast firms are consistent with the staff's findings. Malrite Communications Group warns that "audience and revenue fractionalization will likely lead to curtailment in quality and quantity of core local programming, and may ultimately result in stations being forced to go dark."[130] In the words of Frederick J. McCune of WYDO-TV, Greenville, N.C., "High costs and tremendous competition have forced broadcast television to cut back on expensive local programming."[131] He then observes in very practical terms the difficulty local stations face in competing with cable television:

> All the best intentions in the world on the part of the broadcaster and the FCC do not overcome this basic fact: given a choice between the local Chamber of Commerce TV show and "CNN", today's television audience will pick the latter. Given a choice between a pathetic clown with a horn and bad makeup, or the slick programming of Nickelodeon, even a child knows how to push the remote button for Nick.

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128 *Overview* at 5.

129 *Overview* at 2.

130 Malrite Comments at 17.

131 Comments in the Federal Communications Commission's Further Notice of Proposed Rulemaking Regarding Broadcast Television Ownership Rules, MM Docket No. 91-221 (filed May 17, 1995, by Frederick J. McCune) at 2 [hereinafter cited as "McCune"].

> Local broadcast stations simply cannot afford to produce quality local programs when they have but one outlet for their material.[132]

Ellis Communications, Inc., issues a similar admonition:

> As a result of the increase in competition from other stations, emerging technologies, and other media, many broadcast television stations, particularly in smaller markets, are now marginal operations.[133]

In no way, therefore, has broadcast television been immune from the effects of more competition. Particularly outside the core of powerful, established, major market VHF affiliates, the industry has shown an increasing vulnerability to the financial impact of multichannel competition.

Furthermore, no turnaround in the competitive plight of local broadcast stations may be expected. As the EI Study states, "The viewer share of broadcast stations is likely to decline over time as alternative video delivery systems increase in popularity."[134]

2. Common ownership creates opportunities for economies and efficiencies which enhance stations' service to the public.

The benefits of common ownership are well-known (and well-established in the record) and hardly may be denied by the Commission.[135] NBC articulates them

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132McCune at 4.

133Ellis Comments at 3.

134EI Study at 87.

135*See, e.g.,* LSOC Reply at 5-6; *Overview* at 6; EI Study at 90-91; Comments of Media America Corporation, MM Docket No. 91-221 (filed may 17, 1995) at 8.

well in describing the substantial benefits which would flow from a merger involving a UHF station:

> If the UHF station(s) involved in the proposed transaction is weak, it would benefit from the cost savings, economies of scale and efficiencies of shared resources and personnel. These benefits would translate into a stronger, more competitive UHF outlet.
>
> Even in those cases where a UHF station is on solid financial ground, common ownership with a co-located VHF or UHF might enable the station to provide better more diverse program service to the community. For example, the second UHF outlet might be used to more fully utilize newsgathering and local programming resources, resulting in an increase in the locally-produced news and public affairs programming in the community. Other business arrangements between the co-located stations might lead to innovative new programming or public service campaigns. These more innovative approaches to programming and community service, coupled with the cost efficiencies that can be achieved through common ownership, would make both stations more competitive over the long term.[136]

A similar sentiment is echoed from the other end of the spectrum:

> Local stations can and will produce more quality programming if they have additional channels serving different audiences over which they can rerun, repackage and time-shift those local programs. Such an efficient use of local programming lowers the effective cost of each airing to the local station, improving the economics of producing quality local shows that serve the needs and interests of the local public.[137]

The underlying economies of combined operations are very real. As Dispatch Broadcast Group, an experienced local broadcaster, states:

> [L]ocal television duopolies will create significant economies of scale for television operators. Dispatch estimates that these savings -- in eliminating many duplicative functions like engineering, traffic, and accounting as well as duplicative costs like rent, taxes, and insurance --

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[136]Comments of National Broadcasting Company, Inc., MM Docket No. 91-221 (filed May 17, 1995) at 29-30 [hereinafter cited as "NBC Comments"].

[137]McCune at 4.

> will equal 15-25 percent of the combined operating budgets of two stand-alone stations. Duopolies will also make investments in local programming easier to justify because both the risks and initial costs of starting or expanding a local news operation, for example, can be spread over two stations rather than one.[138]

Thus, as NBC concludes:

> As competition from new video outlets increases (many of which are under common ownership), local television broadcasting will become a more economically fragile business. Allowing common ownership of more than one station in a DMA will give local broadcasters a way to maintain their competitive strength in the face of new competition, without diminishing competition or diversity in the local marketplace.[139]

In short, the record establishes that duopolies are likely to prompt significant improvements in local television service.

Furthermore, by improving the financial vitality of marginal local television stations, common ownership would promote the expansion and ultimate success of new broadcast networks.[140] Finally, all stations are confronting the enormous costs of converting to digital transmission. Stations forming the marginal fringe face the real prospect of being left out simply because they cannot afford to build new digital facilities. The ability to tap the efficiencies of common ownership would contribute materially to the ability of these stations to enter the next millennium as digital broadcasters.

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[138]Comments of the Dispatch Broadcast Group, MM Docket No. 91-221 (filed May 17, 1995) at 8 [hereinafter cited as "Dispatch"].

[139]NBC Comments at 30.

[140]*See* INTV Comments at 17-19.

IV. The Public Interest Benefits of Common Ownership Have Been Proven Through Extensive Experience With Local Marketing Agreements.

In 1995 the EI Study lamented that "hard evidence of the efficiencies that would be realized through joint ownership of stations with overlapping Grade B contours obviously is not available, since joint ownership under these circumstances has not been permitted."[141] Now, however, the Commission can draw on the experience of licensees involved in LMAs of stations in the same market to gain solid evidence of the economies and, more significantly, the improvements in service which invariably have occurred.

A review of the record reveals no dearth of evidence. Numerous licensees have submitted detailed accounts of their experiences with LMAs. They show that the ability to enter into LMAs, share resources, and combine operations to various extents have

- saved failing stations and enabled unbuilt stations to go on the air (or, at least go on more quickly with better service);[142]
- enabled stations to begin new or restore discontinued local newscasts;[143]

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[141] EI Study at 90.

[142] *See, e.g.*, McCune at 8; LSOC Comments at 28-32; INTV Comments at 29-31; Reply Comments of Pappas Stations Partnership, MM Docket No. 91-221 (filed July 10, 1995) [hereinafter cited as "Pappas Comments"] at 2-4; Comments of Sinclair Broadcast Group at 5-11.

[143] *See, e.g.*, LSOC Comments at 28-32; INTV Comments at 29-31; Pappas Comments at 2-4; Sinclair Broadcast Group Comments at 5-11; Ellis Comments at 7; Malrite at 32-33; Reply Comments of Smith Broadcasting Group, MM Docket No. 91-221 (filed July 10, 1995) at 6-7 [hereinafter cited as "Smith Reply"].

- enabled stations to provide new programming for children and/or minorities;[144] and
- provided affiliates for emerging networks.[145]

In many instances, millions of dollars in new capital have been infused into the operation of LMAd stations, thereby facilitating improvements in their technical facilities and programming. Stations which had been broadcasting home shopping and "triple runs," now are furnishing local newscasts, professional sports events, children's programming, and local public affairs programming. The Commission, therefore, now is confronted with an evidentiary record that transcends the theoretical efficiencies and benefits of combined operations and demonstrates with hard facts that combined operations lead to more and better broadcast service to the public.

V. Stations Licensed to Communities in Different DMAs Should Be Considered as Located in Distinct Markets.

The Commission proposes a two-pronged test for determining whether stations serve the same market. Two stations would be considered as in the same market if they were located in the same DMA or if their predicted Grade A contours

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[144]*See, e.g.*, LSOC Comments at 28-32; INTV Comments at 29-31; Pappas Comments at 2-4; Sinclair Broadcast Group Comments at 5-11; Ellis Comments at 7; Malrite at 32-33; Smith Reply at 6-7; Comments of Media America Corporation, MM Docket No. 91-221 (filed May 17, 1995) [hereinafter cited as "MAC"] at 9-10.

[145]*See, e.g.*, LSOC Comments at 28-32; INTV Comments at 29-31; Pappas Comments at 2-4; Sinclair Broadcast Group Comments at 5-11.

overlapped. LSOC, however, urges the Commission to eliminate the contour overlap criterion. For all intents and purposes, stations in different DMAs do not compete, regardless of any overlap of the predicted signal contours.[146]

A. The DMA Is Universally Recognized as the Determinant of a Television Station's Market.

The economic market in which a station competes is best defined by the station's Nielsen Designated Market Area ("DMA"). This has been recognized repeatedly by Congress and the Commission. For example, Congress, in defining the proper scope of a station's local carriage area for must carry/retransmission consent purposes settled on the Arbitron ADI as "the most common industry definition of a television market."[147] Congress wished to define the stations' market areas according to the areas which they serve and which form their economic market."[148] The Commission has acknowledged Congress's intent:

> The use of ADI markets, according to the legislative history of the 1992 Cable Act, is intended "to ensure that television stations be carried in

[146] Thus, under LSOC's proposal, stations with overlapping Grade A or Grade B contours would be considered located in separate markets if they were located in different DMAs.

[147] H.R. Rep. 102-628, 103d Cong., 2d Sess., at 66. The ADI or Area of Dominant Influence was the Arbitron equivalent of the Nielsen DMA.

[148] *Id.* at 97. Congress also amended the Copyright Act to conform the definition of a local station to its DMA. *See* 17 U.S.C. §111 (f).

> the areas which they service and which form their economic market."[149]

In short, Congress -- and the Commission -- have looked to the *reality* of the industry and, in particular, stations' economic markets in defining their local areas for must carry/retransmission consent purposes. This is precisely the Commission's current goal -- to define a station's market in economic terms. Indeed, the DMA has been and remains a critical unit of measurement in the purchase of broadcast advertising. Again, as explained by Mal Beville, former head of the Broadcast Ratings Council, now the Electronic Media Ratings Council:

> Because of today's dominance of television in national advertising and marketing, the ADIs and DMAs have been adopted for many corporate marketing and control functions and are widely used as the basis for the geographic distribution of advertising expenditures for radio, newspapers, and other media.[150]
>
> He further explained:
>
> ADIs and DMAs were additive (with no duplication problems) and could easily be computed for lineups of network or spot stations used by advertisers, as could audience projections from these market units. Very quickly, ADIs and DMAs (which were often identical and seldom varied by more than one or two small outlying counties) became basic market and media units of measurement for sales quotas, advertising appropriations, and other marketing distributions. The FCC adopted ADI market ranking as a basis for certain regulatory guidelines. Radio and newspaper audience data are published on this geographic unit. Television's prime marketing role for national advertisers was confirmed by industry acceptance and use of ADIs and DMAs.[151]

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[149]*Greater Worcester Cablevision, Inc., et al.*, DA 95-2304 (released November 15, 1995) at ¶14, *citing* H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[150]Beville, Hugh Malcolm, Jr., *Audience Ratings: Radio, Television, and Cable*, Lawrence Earlbaum Associates, Hillsdale New Jersey (1985) at 198.

[151]*Id.* at 267.

INTV similarly pointed out that "[p]rogramming is purchased and advertising is sold on a DMA basis, not on the geographic scope of a station's signal."[152]

Now the Commission has adopted the DMA in lieu of the ADI for a variety of purposes, including other aspects of its ownership rules. Earlier this year, the Commission proposed to use DMAs in its analyses of broadcast ownership matters.[153] Shortly thereafter, the Commission began analyzing ownership issues using DMA-based factual showings.[154] Thus, the Commission already has recognized that the DMA is the appropriate market definition for purposes of other parts of its ownership rules.

No conceivable basis exists, therefore, for the Commission to hesitate to embrace the DMA as the most suitable determinant of a station's geographic market.

152INTV Comments at 7; *see also* EI Study at 88.

153*Further Notice*, 10 FCC Rcd at 3539, n. 59 ("Since Arbitron no longer updates its ADI lists, we propose to use DMAs in our future analysis of the issue....). The Commission further stated:

> We propose to continue to rely on a contour overlap standard but will consider the DMA definition of "local" for determination of the relevant geographic dimensions of the market for delivered programming.

Id., 10 FCC Rcd at 3540 (1995).

154*Stockholders of CBS, Inc.*, FCC 95-469 (released November 22, 1995) at ¶69, n.24.; *Media/Communications Partners Limited Partnership*, 10 FCC Rcd 8116, n.3 (1995).

B. A Contour Overlap Test Would Be Largely Redundant and Unnecessary.

Supplementing a DMA-based market definition with a contour overlap prohibition is unnecessary. When stations are in different DMAs, the overlap of their Grade A contours occasions no finding that they are competitors. For example, stations in Washington and Baltimore would be considered competitors, when, in fact, nothing could be further from the truth.[155] The same is true in the case of Boston and Providence, separate DMAs with stations with overlapping Grade A contours.[156] As pointed out by Allbritton Communications Company:

> Although a television station may have viewers outside its DMA, it does not compete for those viewers since television advertising is sold on the basis of ratings measured only in the station's own DMA. There is no profit from viewers outside the DMA and no power to manipulate advertising rates by virtue of a combination with a station in another DMA. Advertisers seek and serve discrete markets -- markets defined by DMAs not by predicted signal contours.[157]

The Commission, therefore, ought consider stations in different DMAs in different markets for purposes of the local ownership rule without regard to contour overlap.

155Further Comments of Westinghouse Broadcasting Company (Group W), MM Docket No. 91-221 (filed May 17, 1995) at 27.

156INTV Comments at 7.

157Reply Comments of Allbritton Communications Company, MM Docket No. 91-221 (filed July 10, 1995) at 3 [hereinafter cited as "Allbritton Reply Comments"].

C. A Contour Overlap Test Would Lead to Arbitrary Results and Administrative Nightmares.

The use of contour overlap standards never has been "pretty." For years, the Commission struggled with cases involving stations with immaterial overlap of their Grade B contours. Confronted with situations in which stations with overlapping contours clearly were not competitors, the Commission was forced to create "purple cow" exceptions.[158] In fact, the present Grade B contour standard seems more often honored in the breach in light of the Commission's growing appreciation that broadcast markets are creatures of economic reality rather than predicted signal propagation.

Finally, contour overlap standards will produce different results on a station by station basis. NBC observes that

> [T]he appropriate geographic market is the DMA, because the DMA definition attempts to capture actual television viewership, advertising sales and program acquisition patterns. Moreover, it permits a more consistent definition of geographic market than one that changes depending on the stations at issue.

The Commission might maintain intra-market uniformity among stations, therefore, only via a DMA-based market definition.

The Commission, therefore, should simply let go of a criterion which long ago outlived its usefulness and rely on the market definition which governs industry practice, the DMA.

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158 *See, e.g.*, *Capital Cities Communications, Inc.*, 59 RR 2d 451, 465 (1985); *Station Partners*, *supra*.

D. The Commission Should Make an Exception to a DMA-based Market Definition in Cases Where No Overlap of Two Stations' Grade A Contours Exists.

In some geographically large DMAs, two stations located at extreme ends of the DMA hardly may be considered competitors. LSOC, therefore, urges the Commission to create a "safety valve" exception to the DMA-based market definition for stations located in the same DMA, but with no predicted Grade A contour overlap. Such stations typically, indeed, necessarily, would be licensed to communities separated by at least 60-100 miles or even more. In some hyphenated markets, they might be even farther away from each other. Often, the geographically expansive markets are the home of two affiliates of the same network -- a stark indicator that the stations are not considered competitors despite their assignment to the same DMA. As noted by Allbritton Communications:

> Owners of stations in geographically large DMAs that can accommodate more than one co-owned station without overlapping Grade A signals should not be penalized simply because of the size or topography of the market, typically rural, rugged, and sparsely populated.[159]

Therefore, the Commission ought remain open to common ownership of two stations located in the same DMA, where no overlap exists between the Grade A contours of the station.[160]

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[159]Allbritton Reply Comments at 5.

[160]LSOC recognizes the need for some caution. For example, a station which has achieved cable carriage widely in a large DMA might be considered ineligible to invoke the exception. Notably, this is an area where the Commission has considerable experience. It routinely considers exceptions to the ADI-based market definition for purposes of the must carry provisions of the Cable Act.

VI. The Rule Should Be Amended to Permit Common Ownership of a UHF Station by the Licensee of Another UHF or VHF Station in the Same Market.

LSOC urges the Commission to adopt a general UHF-based exception to the duopoly rule. Under LSOC's proposed exception, the licensee of a UHF or a VHF station in the market could acquire a UHF station in the same market. No waiver process or special showing would be required. UHF stations continue to operate under inherent disadvantages. These disadvantages are indigenous to UHF transmission and affect all UHF stations similarly. Moreover, the current state of the video marketplace more than assures that neither competition nor diversity would be at risk under such a rule. Therefore, case-by-case waivers would be unnecessary and administratively burdensome to local station licensees and the Commission.

LSOC does emphasize at the outset that the Commission would retain the obligation to determine that any proposed assignment of license or transfer of control of a licensee involving two stations in the same market was consistent with the public interest. Where petitions to deny present compelling reservations about the proposed common ownership of two stations in the same market, then the Commission could refuse to permit the acquisition.[161]

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[161] The obvious arena for concern would be smaller markets with, for example, only three local stations. Proposals for common ownership of more than one station in such a market should be subject to careful evaluation by the Commission.

Nonetheless, as a general rule, UHF-UHF and VHF-UHF ownership in a single market should be allowed and facilitated by an outright exception to the current duopoly rule.

A. Different Treatment of UHF Stations Is Dictated by a Real and Continuing UHF Handicap *Vis-a-vis* VHF Stations.

The UHF handicap is real and continuing. The record evidence in this proceeding does nothing but confirm what every UHF broadcaster knows -- that UHF stations remain at a significant disadvantage *vis-a-vis* their VHF competitors. No party has argued seriously that the UHF handicap has been overcome. Many, mainly UHF broadcasters, have confirmed and substantiated their view that the UHF handicap is still a significant factor in the marketplace.

The UHF handicap, of course, is rooted in the unalterable differences in propagation characteristics of higher frequency UHF signals.[162] Whereas some might say that the widespread carriage of UHF signals has eliminated the UHF handicap, this is an overstatement.[163] Cable carriage of UHF signals to a certain extent has ameliorated the UHF handicap, but it has far from eliminated it. First, millions of viewers do not subscribe to cable -- approximately one-third of television households. Second, cable has been a mixed blessing for UHF stations. Whereas it

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[162] *See* Malrite at 17-18. UHF stations invest substantial resources in high-powered transmitters and electricity in an attempt to maximize their coverage. *See, e.g.*, Reply Comments of Silver King Communications, MM Docket No. 91-221 (filed July 10, 1995) [hereinafter cited as "Silver King Comments"] at 2-3.

[163] *See, e.g.*, INTV Comments at 24-29; Malrite Comments at 18.

may carry UHF signals and provide picture quality parity with VHF stations, it also carries the competing cable channels which have eroded all broadcast television station audiences.[164] Furthermore, many weaker UHF stations are carried only because the law requires that they be carried. The fate of that law now rests with the Supreme Court of the United States. If the law is overturned, many UHF stations will lose whatever benefits cable carriage has offered them.

Regardless of cable carriage, UHF stations' audiences continue to lag those of their VHF competitors. The same programs in the same dayparts consistently receive substantially lower ratings on UHF stations than on VHF stations.[165] Malrite has submitted studies in this proceeding showing that

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[164] Comments of the Association of Independent Television Stations, Inc., MM Docket No. 94-123 (filed March 7, 1995) [hereinafter cited as "INTV PTAR Comments"] at 30-31.

[165] INTV's analysis of prime access viewing in November, 1993, shows, for example, that with rare exception programs perform considerably better on VHF stations than on UHF stations, regardless of station type (*i.e.*, independent versus affiliate). On average, the ratings differential was 46.7 %. *INTV Analysis of Prime Access Programming*, as Exhibit Two to the INTV PTAR Comments. Similarly, the *Economic Report* accompanying INTV's PTAR comments also found that the same program broadcast at the same time on a UHF Fox affiliate suffered a one to four rating point disadvantage versus its ratings performance on a VHF Fox affiliate. *The Economic Effects of Repealing the Prime Time Access Rule: Impact on Broadcasting Markets and the Syndicated Program Market (Economic Report)*, prepared by the Law and Economics Consulting Group, Inc., for INTV, King World Productions, and Viacom, Inc., MM Docket No. 94-123 (filed March 7, 1995) at 41.

- The total circulation of the VHF stations in Cleveland exceeded that of the Malrite UHF stations (owned and LMA'd) both from sign-on to sign-off and during prime time.[166]
- Among network affiliates, UHF station shares routinely are below VHF station shares.[167]
- Among independents, too, UHF station shares routinely are below VHF station shares.[168]

Similar data was submitted by LSOC.[169] Data submitted by INTV shows that UHF profitability still lags that of UHF stations.[170]

Lest any doubt remain, one need only consider the scramble to secure VHF affiliates (and abandon UHF affiliates) by the networks in the wake of Fox's investment in New World and the affiliation switches that followed. Such enormous investments are made for good reasons -- in this case, Fox's absolutely accurate perception that VHF affiliates would offer their network better coverage. As noted by Tribune Broadcasting Company:

> In Milwaukee, Atlanta, and Cleveland, CBS switched from a VHF station to a previously unaffiliated UHF station and experienced prime time ratings declines ranging between 35-50 percent for all television households and between 26-46 percent for viewers aged 18-54. These results illustrate that an audience acceptance gap still exists today between UHF and VHF stations, an acceptance gap that even the

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166 Malrite Comments at 19 and Exhibit 2 thereto.

167 Malrite Comments at 19 and Exhibit 3 thereto.

168 Malrite Comments at 19 and Exhibit 4 thereto.

169 NERA (LSOC) at 15, n.19.

170 INTV Comments at 24-26.

> demonstrated popularity of network programming could not overcome.[171]

UHF stations, therefore, continue to suffer the effects of the UHF handicap and continue to operate at a marked and demonstrable disadvantage against their VHF competitors.[172]

Therefore, they would benefit more substantially from the efficiencies of combined operation in terms of their ability to compete with VHF stations and multichannel competitors and provide improved service to their communities. At the same time, combinations involving at least one UHF station offer less reason for concern about reductions in competition or diversity in their markets.

B. The Current Competitive Video Marketplace Insures Against Harm to Competition or the Public Interest.

Combinations involving UHF stations, indeed, present no material risk of harm to competition or the public interest. As well-established in the record in this proceeding and described in Section III, *supra*, the degree of competition and diversity in today's video marketplace assures that competition and diversity will continue to thrive in markets where UHF-UHF or UHF-VHF combinations exist.

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[171]Reply Comments of Tribune Broadcasting, MM Docket No. 91-221 (filed July 10, 1995) at 5, n.5. LSOC understands that Malrite will be submitting an additional study in its comments to be filed in response to the *Second Further Notice* indicating that local network affiliate shares have fallen by 47% on average after the network has switched from a VHF to a UHF affiliate in a market.

[172]The conversion to digital television offers little hope that the UHF handicap will be lessened. Current proposals for digital channel allotments and power levels, for example, are based on replication of stations' existing coverage areas.

No need exists to delineate again those portions of the record. Suffice it to say, none of the basic underlying facts is a secret to the Commission. Several Commission staff studies have found a thriving, diverse, and competitive video marketplace in which broadcast television is but one competitor and, more to the point, a single channel competitor reliant strictly on advertising revenues.[173] They recognize that continuing encroachment of multichannel providers in what once was a broadcast-only marketplace only will draw additional audience share away from local television stations and reduce their ability to compete.[174] In this new video marketplace, the threat is not to competition or diversity, but to the survival of many local broadcast television stations as fit, vibrant competitors and servants of the public interest.

C. An Outright Exception to the Rule Would Be Administratively Simple, Straightforward, and Predictable.

A simple, straightforward exception to the rule for local mergers involving at least one UHF station would accomplish several significant objectives. First, it would offer certainty to entrepreneurs seeking to navigate the increasing perilous and competitive video marketplace. Uncertainty about the legal framework stifles entrepreneurial vigor and undermines competition. Moreover, banks and other lenders, as well as potential equity investors are better able to assess a firm's earnings potential when the applicable regulatory framework is known.

173OPP Report; *Overview.*

174OPP Report at 159 *et seq.*

Second, a rule offers a consistent, predictable result. Again, the stifling damper of uncertainty is avoided. Entrepreneurs can act like entrepreneurs, rather than spend hours with lawyers and economists trying to figure out how to structure a transaction to gain the government's approval.

Third, neither applicants nor the Commission would be saddled with preparing and reviewing, respectively, waiver requests which would do no more than confirm what has been made obvious by the record in this proceeding -- that local combinations involving UHF stations will boost competition and enhance diversity in the local video marketplace. Needless transaction costs and needless diversion of government resources would be avoided.

These points hardly are lost on the Commission, which has stated that a principal goal of this proceeding is "to promote greater certainty by adopting generally applicable rules."[175] The Commission may and should convert its words to action by adopting a generally applicable exception to the duopoly rule permitting common ownership of two stations in a market, provided one of the stations is a UHF station.

D. An Outright Exception to the Rule Would Eliminate Destructive Delays in Processing of Transfer and Assignment Applications.

If the Commission opened the door to common ownership of two stations only via waivers, it would maintain a regime of delay which is out-of-place in

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[175] *Second Further Notice* at 6.

today's dynamic video marketplace. Whereas the Commission staff has improved processing time for assignment and transfer applications (including those subject to frivolous objections and petitions to deny), any application which includes a waiver request necessarily takes longer to process. This inevitable element of delay is inimical to the sound conduct of business in a video marketplace which spasms with revolutionary change on a virtually day-to-day basis. For example, would anyone have predicted the unprecedented wave of affiliate switches which took place recently on the day before the Fox-New World deal was announced? Such developments demand a prompt response. Often a prompt response requires that an application be granted sooner rather than later.

Applications involving waivers take much longer to process and grant. Six to nine months or more is not unheard of.[176] Again, this in no way is to suggests that the Commission is fiddling while Rome burns. The review and analysis of the veritable mountains of information which comprise requests for waiver of the Commission's ownership rules simply takes time.

Time and delay, however, like uncertainty and unpredictability, are the enemy of aggressive entrepreneurs. Furthermore, processing delay also delays the

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[176] *E.g., Meridian Broadcasting Partnership*, 8 FCC Rcd 8399 (1993)(duopoly waiver/nearly nine months); *Paramount Stations Group*, 10 FCC Rcd 10963 (1995)(duopoly waiver/over 10 months); *Station Partners*, 10 FCC Rcd 12383 (1995) (duopoly waiver/seven months).

improvements in program service which common ownership will provide for the public.

In short, the costs of delay are significant and unjustifiable. A rule would permit filing of applications consisting of no more than the information necessary to establish compliance with the rule (*i.e,* that the exception rightfully applies to proposed transaction) and the other usual legal requirements applicable to disposition of licensed broadcast facilities. Such applications would require little, if any, additional time to process, and routinely could be granted as quickly as any other assignment or transfer application.

Therefore, in light of the well-established benefits of common ownership, the equally well-established lack of danger to competition or diversity, the Commission should eschew the unjustified burdens, uncertainty, and delay inherent in a waiver-based approach. Instead, the Commission ought proceed by general rule, adopting an exception to the current duopoly rule for common ownership of two stations in a market, provided one of the stations is a UHF station.

VII. The Commission Should Adopt a Waiver Policy Which Would Permit Common Ownership of a VHF Station by the Licensee of Another VHF Station in the Same Market in Unusual or Compelling Circumstances.

Because VHF stations continue to enjoy inherent advantages over their UHF competitors and because most markets include both VHF and UHF stations, the prospective combination of two VHF stations creates less confidence that competition and the public interest would be served by the combination. LSOC, therefore, disfavors an exception to the rule or even a presumptive waiver policy in the case of VHF-VHF combinations. Instead, the Commission ought consider requests for waivers to permit all-VHF combinations under a more stringent standard and procedure. Indeed, Congress intended that VHF-VHF combinations be allowed only in "compelling circumstances."[177] This standard ought be adopted by the Commission.

"Compelling circumstances" in LSOC's view might include failed stations and vacant allotments. Certain areas also are unique and require special treatment. As the Commission has recognized, Alaska and Hawaii offer compelling circumstances which might justify VHF-VHF duopolies.[178] The Commission also ought consider Puerto Rico similarly in need of such special treatment in light of unique and long-recognized terrain features which adversely affect signal propagation.[179] On the other hand, rarely, if ever, should such compelling circumstances be found in an intermixed market. In any event, Congress has directed application of a "compelling circumstances" test, a directive which LSOC considers appropriate and wise in today's environment.

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[177]Conference Report at 163.

[178]*Second Further Notice* at 20.

[179]*Channel 7, Inc.*, 4 FCC Rcd 5258 (1989).

VIII. Any Waiver Criteria Must Be Rational and Relate Directly to Public Interest Concerns Appropriate for Review by the Commission.

The Commission also has sought comment on criteria which might be employed in a duopoly waiver process.[180] Whereas LSOC favors adoption of an outright exception to the current rule for local combinations involving at least one UHF station, LSOC has no wish to remain silent on waiver criteria inasmuch as the Commission's thinking on such criteria reflects its view of the video marketplace, as well.

A. A Minimum Voice Test Is a Logical Means of Assuring a Minimum Level of Diversity in a Market, But Should Encompass All Media Voices.

A view of the video marketplace which looks only to local broadcast television stations is arbitrary. This is particularly true with respect to application of any minimum voice test.[181] Consumers have access to many more voices in their communities than local broadcast television stations. Radio stations, which have the same public interest obligation to provide issue-oriented programming in their communities as television stations, provide independent voices to the extent that

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180 *Second Further Notice* at 18.

181 Voice diversity speaks to the diversity of independent or antagonistic voices which present independent, although not necessarily different viewpoints to the public. Thus, for example, CNN and Fox News might agree on treatment of a particular issue.They remain, however, very independent voices.

they are separately-owned, as do newspapers, cable operators, cable networks, and magazines.[182]

The Commission has proffered a narrower view, but that view is unrealistic, as shown in Section III.D., *supra*. Many independent voices are available to consumers via many different media in every community. For the same reasons, a waiver criterion based only on broadcast television voices or voices from a few selected media would be arbitrary.

Therefore, LSOC urges the Commission to take a realistic and defensible approach to a minimum voice test. All independent voices in any community must be considered including, but not limited to broadcast radio and television, cable television, cable networks, DBS services, and generally available print media. Any criterion which employs a narrow definition of "voice" would find no support in the record in this proceeding.

B. Market Share and Market Size or Rank Ought Play No Role in Any Assessment of the Public Interest Benefits and Costs of Common Ownership of Television Stations in the Same Market.

The Commission need consider neither market share or market size in reviewing requests for waiver of the duopoly rule. First, Commission consideration of market share would be redundant. As the Commission is well aware, the

182The Internet and World Wide Web ultimately epitomize the means of providing consumers access to countless voices, ranging from major, established new organizations to personal home pages. *See* LSOC Reply at 13-14.